90-1213

Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

October Term, 1990

LINDA McMAHON, DIRECTOR, STATE DEPARTMENT OF SOCIAL SERVICES AND STATE DEPARTMENT OF SOCIAL SERVICES,

Petitioners,

vs.

VICTORIA GRIMESY, et al.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Does an appeal by a third-party defendant under Federal Rules of Civil Procedure 14 which attacks the validity of the judgment against the third-party plaintiff/defendant constitute an appeal from that judgment?

PARTIES TO THE PROCEEDING IN THE COURT OF APPEALS

The parties to the proceeding below were:

Plaintiffs/Appellees:

Victoria Grimesy
Lisa M. Mayo
Erika Smith
Lucy Rico
Michelle Boles
Gina Mosqueda

on their own behalf and on behalf of all others similarly situated.

Defendants/Appellees:

Jesse Huff, Director, State Department of Finance

State Department of Finance

Defendants/Third-Party Plaintiffs/Appellees:

Linda McMahon, Director, State Department of Social Services

State Department of Social Services

Third-Party Defendants/Appellants:

Otis R. Bown, who has been succeeded by Louis W. Sullivan, M.D., as Secretary of the United States Department of Health and Human Services

The United States Department of Health and Human Services

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

Petitioners Linda McMahon, Director of the California Department of Social Services, and the California Department of Social Services respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals in the Ninth Circuit entered in the above-entitled proceeding, as amended on July 25, 1989.

OPINION BELOW

The opinion of the Court of Appeals for the Ninth Circuit is reported as *Grimesy v. Huff*, 876 F.2d 738 (9th Cir. 1989) and is reprinted in the Appendix hereto.

Because the issue which we seek reviewed was not raised in this action until plaintiffs/appellees' Petition for Rehearing in the Court of Appeals, there are no district court opinions on the issue, published or unpublished.

JURISDICTION

The district court entered its order on December 22, 1986. The Court of Appeals entered its amended opinion reversing the district court's order on July 25, 1989. These petitioners filed a petition for rehearing, which was denied by the Court of Appeals in an Order filed November 1, 1990. Copies of the district court and circuit court orders are contained in the appendix.

Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1). This is a proper case for a writ of certiorari under Rule 10.1(a) of this Court because the decision of the Court of Appeals is in direct conflict with the decision of the Court of Appeals for the Fifth Circuit in *Kicklighter v. Nails by Jannee, Inc.*, 616 F.2d 734 (1980).

STATUTORY PROVISIONS INVOLVED

Federal Rules of Civil Procedure, Rule 14(a) which, in pertinent part, reads:

> At any time after commencement of the action a defending party, as a third-party plaintiff, may cause a summons and complaint to be served upon a person not a party to the action who is or may be liable to the third-party plaintiff for all or part of the plaintiff's claim against the third-party plaintiff. . . . The third-party defendant may assert against the plaintiff any defenses which the third-party plaintiff has to the plaintiff's claim.

STATEMENT OF THE CASE

This case involves the cooperative federal-state program which provides financial assistance to needy families known as Aid to Families with Dependent Children (AFDC), which is codified at 42 U.S.C. § 601, et seq. California, like all the other states, does participate in the AFDC program, for which the costs are generally shared 50-50. In California, the program is administered by the Department of Social Services. The program is supervised nationally by the United States Department of Health and Human Services (HHS).

Although states do not have to have an AFDC program, if they do, they must operate their programs pursuant to the requirements of HHS regulations. *Heckler v. Turner*, 470 U.S. 184, 189 (1985); *Luckhard v. Reed*, 481 U.S. 368, 371 (1987); *Bowen v. Gilliard*, 483 U.S. 587, 589 fn. 1 (1987).

Eligibility for AFDC is determined by, among other things, the family's income and resources. In the Deficit Reduction Act of 1984, Congress added 42 U.S.C. § 602(a)(39), which has sometimes been referred to as the

"grandparent deeming" rule, which requires the counting of the grandparents' income in the determination of eligibility of certain minor parents living with their parents. For states like California, HHS adopted a regulation (45 CFR § 233.20(a)(3)(xviii)) which required California to apply the "grandparent deeming" rule to all 18-year-old parents living with their parents.

Plaintiffs/appellees Victoria Grimesy, et al. commenced this action in state court against petitioners (State), alleging that the State's compliance with the HHS regulation violated 42 U.S.C. § 602(a)(39) to the extent it required the "grandparent deeming" rule to be applied to all 18 parents, not just those attending school. The State removed the action to the federal district court pursuant to 28 U.S.C. § 1441(b) and filed a third-party complaint against HHS pursuant to FRCP 14.

The district court agreed with plaintiffs and entered a permanent injunction enjoining the enforcement of the regulation. The district court also ruled that the plaintiffs were entitled to payment for the benefits wrongfully withheld in the past and ordered the parties to negotiate an order concerning the provision of the wrongfully denied benefits.

The issue of prospective relief became moot when, in the Tax Reform Act of 1986, Congress amended 42 U.S.C. § 602(39) so as to prohibit the application of the "grandparent deeming" rule to all 18-year-old parents living with their parents. The amendment was made retroactive back to the date section 602(a)(39) was originally operative; namely, October 1, 1984. Section 1883(b)(11)(B) of the 1986 Tax Reform Act provided

> No State shall be considered to have made any overpayment or underpayment of aid, under . . . the Social Security Act, by reason of its compliance or noncompliance with the provisions of any amendment made by [this statute] . . . in the administration of the plan during the period [from October 1, 1984 to the day preceding the enactment of this statute].

The State took that statute literally and concluded that it did not intend to excuse nonpayment of amounts due under section 602(a)(39) prior to its amendment. Accordingly, the State negotiated with plaintiffs the terms of an order to provide the benefits that had been wrongfully denied the plaintiffs. One of the integral provisions of that proposed order provided that HHS would pay its usual share (50 percent) of the costs of compliance with the order.

HHS objected to the proposed order, arguing, among other things, that section 1883(b)(11)(B) of the 1986 Tax Reform Act provided that the State had no obligation to pay the amounts wrongfully withheld from the plaintiffs. The district court rejected HHS's contentions in that regard and, with minor exceptions not here relevant, adopted the order as proposed by plaintiffs and the State.

HHS appealed; the State did not.

In the appellate proceedings, plaintiffs were labeled "appellees" by the Court and they filed briefs and argued the case as appellees. In fact, the posture of the parties on appeal was precisely the same as in the district court – on one side there was the plaintiffs, on the other was HHS. See, for example, the May 12, 1987 Order of the Court of Appeals, a copy of which is contained in the Appendix.

The role of the State was nominal. For example, the initial brief for HHS was 50 pages, the initial brief for plaintiffs/appellees was 47 pages, while the State's initial brief was only 9 pages – and not one word of those 9 pages related to the issue regarding the meaning of section 1883(b)(11)(B) of the 1986 Tax Reform Act.

Following the oral argument, at which the plaintiffs/appellees presented the principal arguments against HHS's interpretation of section 1883(b)(11)(B), the Court of Appeals, on May 25, 1989, issued its Opinion, in which it accepted HHS's argument that section 1883(b)(11)(B) excused the State from making any retroactive payments for violations of the "grandparent deeming" statute before its amendment. It rejected the arguments advanced by plaintiffs/appellees and ordered the case "REVERSED AND REMANDED."

Thereafter, plaintiffs/appellees filed a Petition for Rehearing in which they made a complete "about face" and, for the very first time, argued that the decision of the Court of Appeals had no effect on them whatsoever because the State had not filed a separate notice of appeal. The State did not file an opposition to the Petition for Rehearing because it was not allowed to do so. FRAP 40(a); Ninth Circuit Local Rule 40-1.

On July 25, 1989, the Court of Appeals, without first giving the State any opportunity to oppose the petition for rehearing, granted plaintiffs/appellees everything they wanted by adding a conclusion which contained the sentence

> We note that because California did not appeal the district court's decision, this opinion has no

effect on the district court's orders as they pertain to the State of California.

On August 4, 1989, the State timely filed a petition for rehearing from the opinion as amended. On November 1, 1990, after allowing the plaintiffs/appellees to file an opposition, the Court of Appeals filed its Order denying the State's petition.

REASONS FOR GRANTING THE WRIT

A. Introduction

While it does not agree with the interpretation of section 1883(b)(11)(B) of the Tax Reform of 1986 rendered by the Ninth Circuit, that is not the reason for which the State seeks a writ of certiorari. To the contrary, the State seeks review only of the one sentence that was added to the opinion to the effect that the opinion has no effect whatsoever on the State.

B. The Challenged Portion of the Court of Appeals' Opinion, as Amended, is Directly Contrary to the Decision of the Court of Appeals for the Fifth Circuit in *Kicklighter v. Nails by Jannee, Inc.*, 616 F.2d 734 (5th Cir. 1980)

The one sentence holding of the Court of Appeals to the effect that the opinion in the case can have no effect on plaintiffs' judgment against the State because HHS (the third-party defendant), not the State (defendants), filed the notice of appeal is directly contrary to the decision of the Fifth Circuit Court of Appeals in *Kicklighter v. Nails By Jannee, Inc.*, 616 F.2d 734 (5th Cir. 1980).

In *Kicklighter*, a buyer (plaintiff) brought an action against the seller (defendant) of fingernail restoration kits, seeking damages for injuries suffered by use of the product. The seller (defendant) filed a third-party complaint against the manufacturer (third-party defendant) seeking indemnification. The district court entered judgment for $25,000 compensatory damages in favor of buyer (plaintiff) against seller (defendant) and in favor of seller (defendant) against manufacturer (third-party defendant). The seller (defendant) did not appeal. The manufacturer (third-party defendant) did appeal and successfully argued that there was an erroneous jury instruction given in the main case. The Court of Appeals ruled that the appeal by the manufacturer (third-party defendant), which resulted in a reversal based on an error in the main case, operated as an appeal of the buyer's (plaintiff's) judgment against the seller (defendant) so as to entitle the seller (defendant) to benefit from the reversal.

The *Kicklighter* decision makes sense because a third-party defendant has the right to "assert against the plaintiff any defenses which the third-party plaintiff [defendant] has to the plaintiff's claim." Federal Rules of Civil Procedure, Rule 14. Stated another way, the third-party defendant can agree that it is liable if the defendant is liable, but step into the shoes of the defendant and argue that the defendant is not liable to the plaintiff. In that limited situation, i.e., where the third-party's appeal goes to the merits of the plaintiff's judgment against the defendant, the Court of Appeals in *Kicklighter* held that the third-party's appeal acts as an appeal of the judgment in the main case.

That is exactly what happened here. HHS did not argue that it was not liable to the State if the State was liable to the plaintiffs. To the contrary, HHS stepped into the shoes of the State and argued that section 1883(b)(11)(B) excused the State from any liability for violations of section 602(a)(39) which occurred before its amendment. Thus, under *Kicklighter*, HHS's appeal operated as an appeal of the judgment against the State.

The amended decision of the Court of Appeals is directly contrary to *Kicklighter*, and this Court should grant certiorari in order to resolve the conflict.

C. The Arguments Advanced By Plaintiffs/Appellees in the Court of Appeals Lack Merit

Because the Court of Appeals cites no authorities to support its one sentence holding on the issue in question, it is appropriate here to comment briefly on the arguments advanced by plaintiffs/appellees below.

In the Court of Appeals, plaintiffs/appellees made no attempt to distinguish the *Kicklighter* decision. Rather, they argued that *Kicklighter* does not have "any continuing vitality" in light of this Court's later decision in *Torres v. Oakland Scavenger Co.*, 487 U.S. 312 (1988). That argument is simply wrong.

This Court's decision in *Torres* did not deal with a third-party defendant situation. To the contrary, *Torres* dealt with a multi-party plaintiff situation where the notice of appeal from a dismissed complaint named only 15 of the 16 plaintiffs. This Court held that the "specificity requirement" of Federal Rules of Appellate Procedure

3(c) prohibited the Court of Appeals from exercising jurisdiction over the plaintiff that did not appeal. The rationale of that holding has no application whatsoever to the present case.

There can be no question but the Court of Appeals had jurisdiction over the State, even though it did not file a notice of appeal. That is so since the State was, at the very least, an appellee. And in this third-party practice case, there can be no question but that the plaintiffs also were appellees. Plaintiffs newly formed contention that they were not appellees is belied by the actions of the Court of Appeals and plaintiffs themselves:

– In the caption of the case, the Court of Appeals consistently referred to plaintiffs as "Plaintiffs/Appellees."

– In its July 25, 1989, Order, the Court of Appeals referred to plaintiffs' Petition for Rehearing as "appellees' request." Slip opinion, page 8124.

– Plaintiffs designed themselves as "PLAINTIFFS-APPELLEES" on the cover of their principal brief in the Court of Appeals.

– Plaintiffs participated in the appeal as a party from the outset. Plaintiffs' briefs on the merits totaled 57 pages, while the States briefs totaled only 18 pages. They appeared at oral argument and addressed the Court of Appeals as a party.

– In their brief in the Court of Appeals plaintiffs stated that if they prevailed on the merits, they would seek fees against HHS pursuant to the Equal Access to Justice Act, 28 U.S.C. § 2412(d). In a motion regarding

attorneys fees recently filed in the Court of Appeals, plaintiffs stated that they intend to seek fees from the State on the issue now before this Court. Yet, plaintiffs could not seek fees as a prevailing party if they were not a party.

– The injunction which is the subject of this appeal provides:

> "STAY PENDING APPEAL
>
> Plaintiffs and [the State] agree that payment of retroactive benefits to class members shall be stayed until the decision in this case is final and the appeal resolved."

If plaintiffs actually thought that the case was final as to the State, then they would have sought enforcement of the order in February 1987, when the time to file a notice of appeal expired. The fact that they have not done so demonstrates that they, too, knew that the decision of the Court of Appeals could result in a reversal of the injunction.

Any suggestion that anyone was confused as to who the real parties to this appeal were would be absurd. This Court should not tolerate plaintiffs' "now you see it; now you don't" approach whereby they treat themselves as parties to the appeal when they feel it is to their benefit to do so but declaim any party status when they feel otherwise.

The only third-party-defendant case cited by plaintiffs/appellees in the Court of Appeals, namely, *Bryant v.*

Technical Research Co., 654 F.2d 1337 (9th Cir. 1981), actually supports the State in this case. In *Bryant*, defendant TRC had filed a third-party complaint against Eastman, which in turn filed third-party complaints against Custom, Ashland, and Columbia. Eastman made a motion for summary judgment against TRC, which was granted. Because Eastman's actions against Custom, Ashland and Columbia were derivative, Eastman's third-party complaint against them was dismissed. TRC appealed the summary judgment decision. Eastman did not appeal the dismissal of Custom, Ashland and Columbia. The Court of Appeals reversed the judgment for Eastman and reinstated the third-party complaint against Custom, Ashland and Columbia, dispite the fact Eastman had not appealed the dismissal. While the *Bryant* decision is not on all fours with this case as is *Kicklighter*, it does reflect the fact that the Court of Appeals recognized that "third-party complaint" cases involve considerations not present in the typical multiparty plaintiff or multiparty defendant case.

None of the other cases relied upon by plaintiffs/appellees in the Court of Appeals dealt with third-party complaint situations. To the contrary, they all dealt with multiparty plaintiff or multiparty defendant cases where the appeal was taken by some, but not all, the losing plaintiffs or defendants.

As explained previously, the considerations present in a case where the notice of appeal is filed by some, but not all, losing parties simply do not apply in the third-party complaint situation where the third-party defendant proceeds, pursuant to FRCP 14, to defend on the basis that the defendant/third-party plaintiff has no liability to the plaintiff.

D. The Court of Appeals' Amended Decision Defies Logic

One would think that, as a general proposition, statutes and rules of procedure should be construed and applied in a manner which makes common sense and produces results that appear reasonable to the everyday person. Rules should not be construed in a manner to produce seemingly unreasonable results unless there is some definite policy objective to be obtained thereby.

To hold that when the appeal of a third-party defendant goes to the merits of the plaintiff's claim against the defendant, the third-party defendant's successful appeal vacates the plaintiff's judgment against the defendant makes sense and produces results that are manifestly fair. To hold otherwise, stated the Court of Appeals for the Fifth Circuit in *Kicklighter*, would create an inconsistency in the judgment:

> "Should we now reverse the judgment against third-party defendant, but leave intact the judgment against defendant because he did not appeal, we would run counter to our previous holding that third-party defendant is liable over to defendant. The anomalous result would be that defendant is ultimately liable, and third-party defendant is not, even though there is an error-free judgment that third-party defendant should be responsible for whatever liability defendant incurs." 616 F.2d at 744.

That holding, made in the context of a products liability case, makes even more sense in a case dealing with the jointly funded AFDC program, for which HHS pays 50 percent of the program costs incurred by the

State. In fact, not reversing the injunction creates an apparent irreconcilable conflict.

HHS pays 50 percent of the State's AFDC costs. Specifically subject to federal financial participation are

> "Payments of assistance within the scope of Federally aided public assistance programs made in accordance with a court order." 45 CFR § 205.10(b)(3).

If the State must comply with the injunction and the federal agency pays its share, then the entire decision of the Court of Appeals regarding the meaning of section 1883(b)(11)(B) of the Tax Reform Act of 1986 is nothing more than interesting, but meaningless, verbiage.

If, on the other hand, the State is required to comply with the judgment, which is now concededly wrong, the State would be required to compute AFDC benefits in a manner contrary to federal law, a luxury that the State does not have. See, *Heckler v. Turner*, 470 U.S. 184, 189 (1985) (the State "must administer its assistance program pursuant to a State plan that conforms to applicable federal statutes and regulations").

In the Court of Appeals, plaintiffs/appellees simply argued that this was an "injustice" that was mandated by this Court's decision in *Torres* and the other Circuit Court decisions which dealt with multiparty plaintiff or multiparty defendant situations. As explained before, the policy considerations relating to appellate court jurisdiction and the "specificity requirement" of FRAP 3(a) do not mandate any sort of "injustice" in these third-party complaint (i.e., derivative liability) cases.

CONCLUSION

In the appeal by third-party defendant HHS, the Court of Appeals held that section 1883(b)(3)(B) of the Tax Reform Act of 1986 relieved the State from making the payments ordered by the district court. To not give effect to that decision defies common sense and places the State in the untenable position of being forced to violate federal law by spending precious welfare dollars to make payments to persons who the Court of Appeals has concluded are not entitled to the payments. That result is not called for by any Rule, decison of this Court or public policy consideration.

Accordingly, this petition for certiorari should be granted. In fact, since the State does not challenge the principal decision of the Court of Appeals, this Court could summarily dispose of this matter by ordering the Court of Appeals to strike the last sentence of its amended opinion.

Dated: January 25, 1991

Respectfully submitted,

DANIEL E. LUNGREN,
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APPENDIX

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

VICTORIA GRIMESY; LISA M. MAYO; ERIKA SMITH; LUCY RICO; MICHELLE BOLES; GINA MOSQUEDA;

Plaintiffs/Appellees,

v.

JESSE HUFF, Director, State Department of Finance; STATE DEPARTMENT OF FINANCE,

Defendants/Appellees,

and

LINDA MCMAHON, Director, State Department of Social Services; STATE DEPARTMENT OF SOCIAL SERVICES,

Defendants/Third-Party-Plaintiffs/Appellees,

v.

OTIS R. BOWEN, as Secretary of the United States Department of Health and Human Services; and the UNITED STATES DEPARTMENT OF HEALTH & HUMAN SERVICES,

Third-Party-Defendants/Appellants.

No. 87-1745

D.C. No. CV-86-0947-SW

ORDER AND AMENDED OPINION

Appeal from the United States District Court
for the Northern District of California
Spencer M. Williams, District Judge, Presiding

Argued and Submitted
November 16, 1988 – San Francisco, California

Filed May 25, 1989
Amended July 25, 1989

Before: Alfred T. Goodwin, Chief Judge, Joseph T. Sneed and Procter Hug, Jr., Circuit Judges.

Opinion by Judge Sneed

SUMMARY

Welfare

Reversing the district court's judgment, the court held that Congress did not intend retroactive application of its new statute that a class of mothers were to receive aid without regard to their living situation.

In this class action, plaintiffs were eighteen-year-old mothers residing with their parents, who were not attending school, seeking Aid to Families with Dependent Children (AFDC) benefits, and who sued California challenging the "grandparent deeming" law that denied benefits to this class of mothers in which the income of the infant child's grandparents was deemed available to the mother and child. California filed a third-party complaint against the Department of Health and Human Services (HHS), alleging its statute was promulgated to comply with federal law (45 C.F.R. § 233.20(a)(3)(xviii)-(1987)), which required grandparent deeming for all 18-year old parents living with their parents, regardless of school attendance. The issue of prospective relief became

moot when Congress amended the grandparent deeming statute in section 1883(b)(3) of the Tax Reform Act of 1986, 42 U.S.C.A. § 602(a)(39) (West Supp. 1989), and prohibited grandparent deeming for all 18-year old parents. The district court permanently enjoined enforcement of the California regulation, and ordered California and HHS to retroactively reimburse those plaintiffs whose benefits had been improperly reduced as well as pay interest. On appeal, HHS argued that the district court's award of retroactive relief was improper.

[1] To give meaning to section 1883(b)(11)(B), the court in its statutory construction concluded that the best interpretation was that Congress intended to foreclose the plaintiff class of mothers' recovery and not apply section 1883(b)(11)(B) retroactively because the statute provided that no state shall be considered to have made any underpayment of aid of reason of compliance with this section. **[2]** Plaintiffs' manifest injustice doctrine was precluded because **[3]** Congress left no doubt that the amendments were not to be applied retroactively, binding the court to not apply the amendment retroactively. **[4]** A constitutional taking did not occur because the mothers' property right in the retroactively distributed funds did not vest. **[5]** Finally, Congress, by enacting section 1883(b)(11)(B) as interpreted by the Ninth Circuit, did not violate the separation of powers principle.

COUNSEL

Gregory C. Sisk, Appellate Staff, Civil Division, Department of Justice, Washington, D.C., John J. Klee, Jr.,

Deputy Attorney General, San Francisco, California, for the defendants-appellants.

Peter Reid, Redwood City, California, Charles Greenfield, San Jose, California, for the plaintiffs-appellees.

ORDER

The panel in the above entitled action has voted to grant appellees' request to amend the opinion, which was designated a petition for rehearing. The slip opinion filed May 25, 1989 is therefore amended by adding the following conclusion:

VI.

CONCLUSION

> We hold that by enacting sec. 1883(b)(11)(B) Congress intends to preclude the award of retroactive benefits based on the Secretary's incorrect interpretation of the statute. We decline to use the manifest injustice doctrine to avoid applying the amendment retroactively. Finally, sec. 1883(b)(11)(B) neither effects an unconstitutional taking of plaintiffs' property nor violates the separation of powers principle. We note that because California did not appeal the district court's decision, this opinion has no effect on the district court's orders as they pertain to the State of California.

Insofar as appellees' request may be construed as a petition for rehearing, it is denied.

OPINION

SNEED, Circuit Judge:

Plaintiffs sued various California state officials and agencies (California), successfully challenging the validity of state and federal regulations that reduced or eliminated Aid to Families with Dependent Children (AFDC) benefits to eighteen year-old mothers living at home with their parents and not attending school. *See* Calif. Welf. & Inst. Code § 11008.14 (West Supp. 1989); 45 C.F.R. § 233.20(a)(3)(xviii) (1987). California filed a third-party complaint against the Department of Health and Human Services (HHS). As part of the district court's final judgment. California and HHS were ordered to reimburse those plaintiffs whose benefits had been improperly reduced as well as pay interest. HHS appeals[1] and we reverse.

I.

FACTS AND PROCEEDINGS BELOW

This is a class action. Plaintiffs are eighteen-year-old mothers, residing with their parents, who are not attending school. To simplify discussion these mothers will be designated as "class AX mothers."[2] Plaintiffs sued

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[1] California did not file a notice of appeal. The state did, however, file a brief supporting plaintiffs' position.

[2] The following is a description of all the classifications that this opinion uses.

(Continued on following page)

California challenging a state law implementing "grandparent deeming." *See* Cal. Welf. & Inst. Code § 11008.14 (West Supp. 1989). We designate as "class A mothers" the class of eighteen-year-old mothers otherwise eligible for AFDC benefits. Plaintiffs are, as class AX mothers, a subset of a class A mothers consisting of *all* eighteen-year-old mothers, residing with their parents but not attending school. Plaintiffs claim that the regulation violated the AFDC statute and sought injunctive relief against continued enforcement of the regulation as well as payment for wrongfully denied benefits.

California removed the action to federal court and filed a third-party complaint against HHS. California responded that § 11008.14 was promulgated to comply with 45 C.F.R. § 233.20(a)(3)(xviii) (1987) and requested that, if plaintiffs prevailed, HHS be required to reimburse California for their share of any underpayment.

The challenged regulations address the computation of household income for the purposes of determining a "child-mother's" eligibility for, and the amount of, AFDC benefits. "Grandparent deeming" refers to those cases in

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(Continued from previous page)

- Class A mothers – the set of all eighteen-year-old mothers residing with their parents and otherwise eligible for AFDC benefits.

Class AX mothers – the subset of class A mothers who are not attending school.

Class AY mothers – the subset of class A mothers who are attending school and intend to graduate before age 19.

Class AZ mothers – the subset of class A mothers who are attending school but do not intend to graduate before age 19.

which the income of the infant child's grandparents is deemed available to the mother and child. The grandparent deeming statute was promulgated as part of the Deficit Reduction Act of 1984, Pub. L. No. 98-369, sec. 2640(a)(3), § 402(a)(39), 1984 U.S. Code & Admin. News (98 Stat.) 494, 1145 (codified as amended at 42 U.S.C. § 602(a)(39)), and became effective on October 1, 1984. It required grandparent deeming for all parents under the age "selected by the State pursuant to [42 U.S.C. § 606(a)(2)] . . . . " *Id.* Section 606(a)(2) provides that the term "dependent child" shall include a needy child who is "(A) under the age of eighteen, or (B) at the option of the State, under the age of nineteen and a full-time student in a secondary school," if the child is reasonably expected to graduate before age nineteen [class AY mother]. 42 U.S.C. § 606(a)(2) (1982). The designation "class AY mothers" indicates that the class also is a subset of class A mothers.

For states like California that opted for the broader definition of dependent child under 42 U.S.C. § 602(a)(2)(B), HHS *required* grandparent deeming for *all* eighteen-year-old parents living with their parents, regardless of school attendance, that is, all class A mothers. *See* 45 C.F.R. § 233.20(a)(3)(xviii). Plaintiffs argued that 42 U.S.C. § 602(a)(2) and § 602(a)(39) permitted grandparent deeming *only* if the eighteen-year-old mother living with her parents was attending school and expected to graduate before she turned nineteen; that is, deeming should be permitted only with respect to class AY mothers.

The district court agreed with plaintiffs, class AX mothers, and permanently enjoined enforcement of this

regulation. Other courts that have addressed this issue have done the same. *E.g., Kali v. Bowen*, 800 F.2d 971, 973 (9th Cir. 1986); *Morrison v. Heckler*, 602 F. Supp. 1482, 1488-92 (D. Minn. 1984), *aff'd*, 787 F.2d 1285 (8th Cir. 1986).

The issue of prospective relief became moot when Congress amended the grandparent deeming statute in sec. 1883(b)(3) of the Tax Reform Act of 1986, Pub. L. No. 99-514, 1986 U.S. Code & Admin. News (100 Stat.) 2085, 2917 (codified at 42 U.S.C.A. § 602(a)(39) (West Supp. 1989)). The amended statute *prohibited* grandparent deeming for all eighteen-year-old parents, that is all class A mothers. *Id.*

The district court held that plaintiffs, class AX mothers, were entitled to payment of benefits wrongfully denied on the basis of the invalidated HHS and California regulations. The court ordered the parties to negotiate an order concerning the provision of the wrongfully denied benefits. Plaintiffs and California stipulated to a proposed order that would identify the class members, notify them of their rights, and permit them to make claims for benefits denied plus interest at ten percent per annum. The order also required HHS to provide federal financial participation to California in making the reimbursements, including interest. The district court accepted the proposed order with one change, and rejected HHS' objections. HHS challenges the award of retroactive benefits and the award of interest.[3]

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[3] When this appeal was first filed, HHS also challenged the jurisdiction of this court, claiming that the Court of Claims

(Continued on following page)

II.

JURISDICTION

The district court had jurisdiction under 28 U.S.C. § 1331 (1982). The case was properly removed pursuant to § 1441(b). Our jurisdiction rests on § 1291.

III.

STANDARD OF REVIEW

This appeal addresses issues of law and therefore the district court's decision is reviewed de novo. *United States v. McConney*, 728 F.2d 1195, 1201 (9th Cir.) (en banc), *cert. denied*, 469 U.S. 824 (1984).

IV.

STATUTORY CONSTRUCTION

A. *Retroactive Relief*

HHS first argues that the district court's award of retroactive relief was improper. As discussed above, Congress amended the AFDC statute as part of the Tax

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(Continued from previous page)

had exclusive jurisdiction over this cause of action. HHS concedes that the Supreme Court's opinion in *Bowen v. Massachusetts*, 108 S. Ct. 2722 (1988), foreclosed this challenge.

Additionally, HHS also challenged the district court's refusal to limit the award of retroactive benefits to current AFDC beneficiaries. This court rejected the identical argument in *Edwards v. McMahon*, 834 F.2d 796, 799-800 (9th Cir. 1987). HHS acknowledges that *Edwards* binds this court.

Reform Act of 1986. The new law prohibited grandparent deeming for all class A mothers, a class that includes classes AX, AY, and a third class, AZ mothers, which will be described shortly. *See* 42 U.S.C.A. § 602(a)(39) (West Supp. 1989). Congress made the new provision retroactive to October 1, 1984. *See* Pub. L. No. 99-514, sec. 1883 (b)(3)(B), 1986 U.S. Code & Admin. News (100 Stat.) at 2917. Congress also provided:

> No State shall be considered to have made any overpayment or underpayment of aid, under . . . the Social Security Act, by reason of its compliance or noncompliance with the provisions of any amendment made by [sec. 1883(b)(3)] . . . in the administration of the plan during the period [from October 1, 1984 to the day preceding the enactment of this statute].

Id. sec. 1883(b)(11)(B), 1986 U.S. Code & Admin. News (100 Stat.) at 2918.

Based on this final provision, HHS argues that the award to the plaintiffs cannot survive. By making the statute retroactive, it suggests that sec. 1883(b)(3)(11) preempts this suit. *See Stop H-3 Ass'n v. Dole*, No. 87-2204, slip op. at 2618 (9th Cir. Mar. 20, 1989) (upholding Congress' power "to moot a pending controversy by enacting new legislation").[4] In essence, HHS contends that plaintiffs are challenging an interpretation of a repealed statute. Further, the section quoted above, sec. 1883(b)(11)(B),

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[4] While undoubtedly the separation of powers doctrine limits this type of congressional preemption, we are confident that Congress can adjust its social services programs retroactively so as to clarify rights under ambiguous statutes involved in pending entitlement litigation without encountering these limits. *See* Part V(B), *infra*.

demonstrates Congress' desire that HHS not be held liable for any interpretation of the previous statute that was admittedly ambiguous. Plaintiffs respond that this interpretation is too broad. They argue that because the new statute prohibited grandparent deeming for another class of eighteen-year-old mothers (*i.e.*, eighteen-year-old mothers residing at home and attending school and not intending to graduate by nineteen, class AZ mothers by our designation) Congress merely intended to prohibit suits for retroactive benefits by this subclass of beneficiaries. Further, sec. 1883(b)(11)(B) is limited to the *amendments* made by the Tax Reform Act, not the prior statute.

The issue is whether the result of sec. 1883(b)(11)(B) was to impose the burden of deeming from October 1, 1984, to the date before its enactment, only upon classes AY and AZ mothers or upon the entire group of class A mothers consisting of the plaintiffs, AX mothers, as well as the AY and AZ mothers. The proper interpretation of the statute and amendments is not self-evident. Among the numerous legislative reports accompanying the Tax Reform Act of 1986, none explains why sec. 1883(b)(11)(B) was added. Nor have the parties suggested an entirely satisfactory explanation.

Only one court has addressed this issue. *See Richter v. Bowen*, 669 F. Supp. 275 (N.D. Iowa 1987). In *Richter*, the district judge concluded that Congress intended that sec. 1883(b)(11)(B) relieve the states of the administrative burden of recalculating AFDC benefits, and that the amendment did not limit substantive liability. As a result, the court held that *all* eighteen-year-olds (class A mothers), even those that the plaintiffs conceded were properly

subject to grandparent deeming under the previous statute, were entitled to retroactive benefits. *Id.* at 280-81.

We decline to follow *Richter.* It simply defies common sense that from this language one could conclude that Congress not only intended to grant retroactive benefits to those who were wrongfully denied benefits but also grant a windfall to those parents, class AY mothers, who, all concede, properly were subject to grandparent deeming under the old regulations.

[1] We believe that HHS' position represents the most plausible interpretation of the statutory amendment. Had Congress intended to allow the plaintiffs to recover for the wrongfully denied benefits, then there would have been no reason to include sec. 1883(b)(11)(B). Conversely, if, as the plaintiffs suggest, Congress merely wanted to avoid giving a windfall to the class of newly eligible mothers (class AY mothers) this could have been accomplished by making the statute prospective. In order to give meaning to sec. 1883(b)(11)(B), as we are required to do, *see, e.g., United States v. Handy,* 761 F.2d 1279, 1280 (9th Cir. 1985); *CO Petro Marketing Group, Inc. v. Commodity Futures Trading Comm'n (In re CO Petro Marketing Group, Inc.),* 680 F.2d 566, 569-70 (9th Cir. 1982), we conclude that by including this section, Congress intended to foreclose plaintiffs' recovery. Class AX mothers must be treated as classes AY and AZ mothers. This seems to be the best interpretation of the language of the section: "no state shall be considered to have made any . . . underpayment of aid . . . by reason of its compliance . . . with the provisions of any amendment . . . . " Pub. L. No. 99-515, sec. 1883 (b)(11)(B), 1986 U.S. Code & Admin. News (100 Stat.) at 2918.

B. *Manifest Injustice*

Even if HHS interpretation of the statute is correct, plaintiffs urge that applying the statute retroactively to bar relief would be a "manifest injustice," citing *Bradley v. School Bd.*, 416 U.S. 696 (1974). A court should "apply the law in effect at the time it renders its decision, unless doing so would result in manifest injustice." *Id.* at 711. In its alternative holding, the district court held that this doctrine should be applied in this case.[5]

[2] The manifest injustice exception, however, does not apply when Congress clearly intends that a statute be applied retroactively. "Where Congress has manifested its intent in unambiguous terms, we do not think a court is free to fashion equitable exceptions for situations where it feels retroactive application would produce a manifest injustice not amounting to a violation of due process . . . ."

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[5] The plaintiffs argue that this part of the district court's decision should be reviewed for abuse of discretion because the district court was making an equitable determination. They cite *Turf Paradise, Inc. v. Arizona Downs*, 670 F.2d 813 (9th Cir.), *cert. denied*, 456 U.S. 1011 (1982), as support for this assertion. In *Turf Paradise* this court reviewed a district court's decision to abstain for abuse of discretion, reasoning that abstention is an "exercise of the court's equity powers." *Id.* at 819. *Turf Paradise* is not controlling. We have consistently, albeit never explicitly, reviewed the application of the manifest injustice exception de novo. *See, e.g., DeGurules v. INS*, 833 F.2d 861, 863 (9th Cir. 1987); *California Cartage Co. v. United States*, 802 F.2d 353, 357-58 (9th Cir. 1986). Conversely, *Turf Paradise* is consistent with this court's practice of reviewing the application of the abstention doctrines for abuse of discretion. *See, e.g., McIntyre v. McIntyre*, 771 F.2d 1316, 1319 (9th Cir. 1985); *Pue v. Sillas*, 632 F.2d 74, 78 (9th Cir. 1980).

Long v. IRS, 742 F.2d 1173, 1183 (9th Cir. 1984); *accord Estate of Bradford v. United States*, 645 F. Supp. 476, 479 (N.D. Cal. 1986).

[3] Although the terms of the amendment to the AFDC statute may be unclear, Congress left no doubt that the amendments were to be applied retroactively. Congress explicitly made the amendments retroactive to October 1, 1984. We, therefore, are bound to apply them retroactively.

Even were we to apply the manifest injustice doctrine in this case, we would reach the same result. The Supreme Court identified three factors that should be considered in deciding whether the application of a new statute would cause manifest injustice. These are "(a) the nature and identity of the parties, (b) the nature of their rights, and (c) the nature of the impact of the change in law upon these rights." *Bradley*, 416 U.S. at 717. No single factor is controlling. *City of Great Falls v. United States Dep't of Labor*, 673 F.2d 1065, 1068 (9th Cir. 1982) (per curiam)

Applying these factors to this case, we would conclude that no manifest injustice will occur by applying this law retroactively. HHS argues that reducing fiscal outlays is a "great national concern" and therefore the first factor must be weighed heavily in its favor. This suggests the image of a somewhat overextended rich man begging alms from the poor. The nation would survive an adverse judgment in this case. *Cf. Campbell v. United States*, 809 F.2d 563, 575 (9th Cir. 1987) (stating that amendment affecting the rate of interest government pays on damages was not a matter of national concern). As a

general rule, manifest injustice is not likely to be found if the government is adversely affected. *Id.* Conversely, if only private parties are involved, courts are more likely to apply the exception. *Bradley*, 416 U.S. at 717. No court, however, has discussed the situation presented here – when the government is advocating retroactive application of a statute in order to reduce or eliminate the recovery of a private party. What tilt is suggested by the nature and identity of the parties favors the plaintiff. It is not a strong force, however; comparisons between plaintiffs and their related class members weakens their position.

The second factor addresses the nature of the parties' rights. This court has refused to apply a law retroactively when " 'to do so would infringe upon or deprive a person of a right that had matured or become unconditional.' " *Campbell*, 809 F.2d at 575 (quoting *Bradley*, 416 U.S. at 720). In this case, plaintiffs cannot contend that their right to damages had matured or become unconditional. The judgment was still subject to review in this court.

The third factor addresses "the possibility that new and unanticipated obligations may be imposed upon a party without notice or an opportunity to be heard." *Bradley*, 416 U.S. at 720. Again, this factor is not relevant here. The obligations of the respective parties are the subject of this suit. They have been heard. Nothing "unanticipated" has resulted from the adoption of the amendments.

The "manifest injustice" exception, a rule of equity, is designed to exclude the small class of cases in which the parties' obligations are changed unfairly by the new law.

Such an equitable rule has no application in this case where the statutory amendment clarified an ambiguous statute pertaining to a narrow class of dependent children.

V.

CONSTITUTIONAL OBJECTIONS

A. *Taking*

Plaintiffs next assert two constitutional objections to our interpretation of sec. 1883. They argue that, by interpreting the statute to deny them retroactive relief, we have effected a taking without compensation under the Fifth Amendment. What has already been said refutes this. A constitutional taking has occurred when "property" has been "taken." *See Konizeski v. Livermore Labs (In re Consolidated United States Atmospheric Testing Litig.)*, 820 F.2d 982, 988 (9th Cir. 1987), *cert. denied*, 108 S. Ct. 1076 (1988).

[4] Although the Supreme Court has suggested that a cause of action is a "species of property," *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 428 (1982), a party's property right in any cause of action does not vest " 'until a final *unreviewable* judgment is obtained.' " *Atmospheric Testing*, 820 F.2d at 989 (quoting *Hammond v. United States*, 786 F.2d 8, 12 (1st Cir. 1986)) (emphasis added). In *Atmospheric Testing*, the plaintiffs sued various government contractors for damages arising out of exposure to radiation during nuclear testing. While the action was pending, Congress passed a law which required that any action against these contractors be maintained against the

United States under the Federal Tort Claims Act (FTCA). *Id.* at 986.[6] This court, adopting the opinion of the district court, held the plaintiffs had no property right in their claims against the government contractors. *Id.* at 988-89.

Recently, this court applied *Atmospheric Testing* to uphold the application of a statutory amendment that barred the plaintiffs recovery of damages. *See Austin v. City of Bisbee*, 855 F.2d 1429 (9th Cir. 1988). In *Austin*, the plaintiffs, city police officers, sued to recover overtime pay for the hours they spent "on-call" *Id.* at 1431. Their right to recovery was founded upon the Supreme Court's interpretation of the Fair Labor Standards Act (FLSA) in *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985). After the plaintiffs filed their action, but before a final decision was rendered, Congress amended the FLSA to bar relief for failure to pay overtime prior to 1986. *See Austin*, 855 F.2d at 1431. This court rejected the plaintiffs' Fourteenth Amendment challenge to the statutory amendment, observing that the plaintiffs' property interest in their cause of action did not vest until there was a final, unreviewable judgment. *Id.* at 1435-36; *see also Jefferson Disposal Co. v. Parish of Jefferson*, 603 F. Supp. 1125, 1137 (E.D. La. 1985) ("[A] plaintiff does not have a vested property right under the due process clause of the Fifth Amendment in a mere claim for damages."). This conclusion is consistent with that of other courts which have considered the issue. *See, e.g., Eddings v. Volkswagenwerk,*

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[6] After the United States was substituted as the defendant, the district court granted summary judgment in favor of the United States under the discretionary function exception to the FTCA. *See id.* at 984.

A.G., 835 F.2d 1369, 1373 (11th Cir.) (holding no Fourteenth Amendment violation in the retroactive application of twelve year statute of repose that barred plaintiffs' relief), *cert. denied*, 109 S. Ct. 68 (1988); *Hammond*, 786 F.2d at 12 (upholding application of statute substituting the United States as defendant in nuclear testing litigation that operated to bar plaintiffs' recovery); *Hudson County Welfare Dep't v. Roedel (In re Roedel)*, 34 Bankr. 689, 694 (D.N.J. 1983) (holding that debtor had no "vested right" to discharge of child support debt when Congress amended statute before discharge to make debt nondischargeable), *aff'd*, 734 F.2d 5 (3d Cir. 1984).

Thus, there was no Fifth Amendment taking.

B. *Separation of Powers*

Plaintiffs next assert that the enactment of sec. 1883 violated the separation of powers principle. *See United States v. Sioux Nation of Indians*, 448 U.S. 371, 404 (1980); *United States v. Klein*, 80 U.S. (13 Wall.) 128 (1871).

This argument is foreclosed by our decision in *Atmospheric Testing*. We held that Congress had not violated the separation of powers doctrine because the statute in question "neither directs the court to make a certain finding of fact nor requires [the court] to apply an unconstitutional law . . . . " 820 F.2d at 992.

Plaintiffs insist this is not a good enough answer. As they see it, Congress violated the first prohibition by mandating a finding of fact. That is extremely doubtful. Whether a particular class of child mothers is subject to a "deeming" rule sounds very much like a legal issue, not

unlike a multitude of income tax issues such as whether a corporate distribution is "essentially equivalent to a dividend," *etc.* However, assuming a finding of fact was mandated, they further argue that if *either* component is present, Congress has violated the principle. They point out that the court in *Atmospheric Testing* relied on *United States v. Brainer*, 691 F.2d 691 (4th Cir. 1982), in which the Fourth Circuit stated that "Congress violates the separation of powers when it presumes to dictate 'how the Court should decide an issue of fact (under threat of loss of jurisdiction)' and purports 'to bind the Court to decide a case in accordance with a rule of law independently unconstitutional on other grounds.' " *Id.* at 695 (quoting P. Bator, D. Shapiro, P. Mishkin & H. Wechsler, *Hart and Wechsler's The Federal Courts and the Federal System* 316 n.4 (2d ed. 1973) [hereinafter *Hart & Wechsler*]). Plaintiffs argue that the Fourth Circuit misconstrued *Hart & Wechsler*, that the authors believed that Congress violates the separation of powers principle if either component is present. *See Hart & Wechsler* at 316 n.4. Putting aside the question of whether, even if true, this undermines the holding in *Atmospheric Testing*, plaintiffs' position is undermined by the fact that the authors of *Hart & Wechsler* modified their position in the newest edition, stating that the Supreme Court has not definitively held that Congress may not prescribe issues of fact. *See* P. Bator, D. Meltzer, P. Mishkin & D. Shapiro, *Hart and Wechsler's the Federal Courts and the Federal System* at 369 n.5 (3d ed. 1988) (citing Young, *Congressional Regulation of Federal Courts' Jurisdiction and Processes:* United States v. Klein *Revisited*, 1981 Wis. L. Rev. 1189, 1233-38).

[5] Thus, however the matter is approached, our holding remains firm. Congress, by enacting sec. 1883(b)(11)(B) as interpreted by this court, did not violate the separation of powers principle.

VI.

CONCLUSION

We hold that by enacting sec. 1883(b)(11)(B) Congress intends to preclude the award of retroactive benefits based on the Secretary's incorrect interpretation of the statute. We decline to use the manifest injustice doctrine to avoid applying the amendment retroactively. Finally, sec. 1883(b)(11)(B) neither effects an unconstitutional taking of plaintiffs' property nor violates the separation of powers principle. We note that because California did not appeal the district court's decision, this opinion has no effect on the district court's orders as they pertain to the State of California.

REVERSED AND REMANDED.

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

VICTORIA GRIMESY; LISA M. MAYO; ERIKA SMITH; LUCY RICO; MICHELLE BOLES; GINA MOSQUEDA,

Plaintiffs/Appellees,

v.

JESSE HUFF, Director, State Department of Finance; STATE DEPARTMENT OF FINANCE,

Defendants/Appellees,

and

LINDA McMAHON, Director, State Department of Social Services; STATE DEPARTMENT OF SOCIAL SERVICES,

Defendants/Third-Party-Plaintiffs/Appellees,

v.

OTIS R. BOWEN, as Secretary of the United States Department of Health and Human Services; and the UNITED STATES DEPARTMENT OF HEALTH & HUMAN SERVICES,

Third-Party-Defendants/Appellants,

No. 87-1745

DC# CV-86-0947-SW

ORDER

(Filed Nov. 1, 1990)

Before: GOODWIN, SNEED, and HUG, Circuit Judges.

The State Appellees' petition for rehearing or other appropriate relief, filed August 4, 1989, is hereby denied.

/s/ Joseph T. Sneed
United States Circuit Judge

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

VICTORIA GRIMESY, et al., Plaintiffs/Appellees, vs. LINDA MCMAHON, Director of the Department of Social Services of the State of California, et at., Defendants/Third-Party-Plaintiffs/Appellants, vs. OTIS R. BOWEN, Secretary of Health and Human Services, Third-Party-Defendant/Appellant.	Nos. 86-2403 87-1745 DC# CV-86-0947-SW Northern California (San Francisco) ORDER (Filed May 12, 1987)

On May 5, 1987, a Prebriefing Conference was held before Conference Attorney Susan M. Johnson. The United States was represented by Gregory Sisk. The State of California was represented by John J. Klee, Jr. Plaintiffs were represented by Mark Greenberg, Chuck Greenfield, and Peter Reid.

Counsel for the State of California indicated that the State intends to voluntarily dismiss appeal No. 86-2403. The State's motion for voluntary dismissal shall be filed within 14 days from the entry of this order.

The United States has filed a motion to stay briefing on this appeal. Counsel agreed to abide by the following briefing schedule if the motion to stay briefing is denied.

(1) The United States shall file a brief on or before July 7, 1987.

(2) Plaintiffs shall file a brief on or before August 6, 1987.

(3) On or before August 20, 1987, the State of California shall file a brief of not more than 15 pages or a notice that the State does not intend to file a brief.

(4) If the State files a brief, plaintiffs may file a brief of not more than 15 pages within 14 days after service of the State's brief. Plaintiffs' brief shall respond to the State's brief only.

(5) Within 14 days after service of the State's brief or notice, the United States may file a reply brief.

(6) Fed. R. App. P. 28(g) shall govern the length of briefs, other than those provided for in paragraphs (3) and (4).

This order is subject to reconsideration by a judge if any objection is filed within 10 days of the entry of the order.

FOR THE COURT:

/s/ Susan M. Johnson
Susan M. Johnson
Conference Attorney

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

VICTORIA GRIMESY, et al., Plaintiffs, v. LINDA McMAHON, et al., Defendants, v. OTIS R. BOWEN, et al., Third-Party Defendants.	No. C 86 0947 SW ORDER RE: RETROACTIVE BENEFITS (Filed Dec. 22, 1986)

On June 25, 1986, this Court granted plaintiffs' and third party plaintiffs' motions for partial summary judgment and issued a permanent injunction which provided plaintiff class members with prospective relief. At that time, the court also ordered the parties to confer concerning provision of retroactive benefits to plaintiff class members. Pursuant to that order the plaintiffs and the State Department of Social Services ("DSS") have conferred and have stipulated to the following order to compensate all class members whose AFDC benefits were reduced, terminated or denied at any time from January 18, 1985 through June 25, 1986 as a result of the application of DSS regulation EAS Section 44-133.7 and 45 C.F.R. Section 233.20(a)(3)(xviii). The United States Department of Health and Human Services ("HHS") objected to the proposed order in certain respects. The Court has considered the objections of HHS and has concluded that the order for retroactive relief as proposed by plaintiffs and

DSS is fair, reasonable and consistent with the requirements of the Social Security Act. Accordingly,

IT IS HEREBY ORDERED, as follows:

I. IDENTIFICATION OF CLASS MEMBERS

In order to identify plaintiff class members whose benefits have been reduced, terminated or denied, DSS shall:

(A) Compile a list of potential class members by obtaining from the Department of Health Services the names and most recent addresses of all recipients of AFDC or AFDC-linked Medi-Cal who were 18 years of age at any time from January 1, 1985 through August 31, 1986. These potential class members will receive the notice and claim form described in section II below.

(B) Identify those counties which have the ability to easily compile lists of the names and addresses of AFDC applicants who were denied benefits due to excess senior parent income during the period from January 18, 1985 to June 23, 1986 and require those counties to prepare such lists. The counties required to prepare such lists shall statistically represent at least ninety percent (90%) of the statewide AFDC recipient population. DSS shall inform plaintiff's counsel no later than ten (10) days after the date of this order which counties have the ability to prepare such lists and the percentage of the AFDC recipient population represented by such counties.

(C) Develop 17" and 22" posters in English and Spanish to notify class members of their right to benefits. Posters shall be submitted to plaintiffs' attorneys for

review of layout. These posters shall be placed in prominant locations in all county welfare departments and food stamp outlets and DSS shall request that such posters be displayed in EDD offices and Social Security offices throughout the State of California during the claim period specified in Paragraph III. Additionally, DSS shall send a copy of the poster in both English and Spanish to all Legal Services offices throughout the State of California in accordance with a list furnished by plaintiffs' counsel. All CWDs shall maintain copies of the *Grimesy* Notice and Claim forms so that persons who learn of the lawsuit through posters or other means may obtain and file claim forms.

II. NOTICES AND CLAIM FORMS

(A) Within four weeks of the receipt of this order, DSS shall develop a general written Notice and Claim form and a Supplemental Claim form and submit these documents to plaintiffs' attorneys for review.

(B) Within two weeks of receiving the draft claim forms, plaintiffs' attorneys will submit to DSS any comments on the proposed language, content and format of the forms. Within two weeks after receipt of these comments, DSS and plaintiffs' attorneys shall meet and confer attempting to resolve any differences regarding the language, content, and format of said forms.

(C) In the event the parties cannot reach agreement, DSS may use its proposed forms unless within five (5) working days following the meeting, plaintiffs file a motion with the Court challenging the proposed forms.

III. CLAIM PROCESSING

(A) On or before April 1, 1987, DSS or its agents shall mail a notice and claim form to all potential class members identified pursuant to Section I above. The claims period shall run until June 30, 1987. Claims with a postmark after June 30, 1987 shall be denied as untimely. All claims shall be processed within 90 days of the close of the claim period.

(B) When a claim has been received, the County Welfare Department ("CDW") shall attempt to locate a case record for the claimant, including a Medi-Cal case record.

(1) Where the case record contains information sufficient to determine retroactive benefits, the CWD shall calculate the retroactive benefits and shall issue a payment, including interest, to the claimant.

(2) Where the case record does not exist or does not contain information sufficient to determine retroactive benefits or where the claim form received by the CWD is incomplete or inconsistent with information in the case record, the CWD shall send a supplemental claim form to the claimant. Claims shall be denied when a supplemental claim form is not postmarked within 60 days of mailing to claimant. When the claimant submits the additional information needed to process the claim, the CWD shall calculate the retroactive benefits and issue a payment, including interest, to the claimant.

(a) Claimants may be requested to supply documentation of information provided in the supplemental claim form where such documentation is actually in the claimant's possession.

(b) Where claimants do not have documentation in their possession they may be asked to sign a release of information enabling the county to obtain documentation on their behalf. Signature of the release and the claimant's sworn statement that the information provided is correct, will be sufficient to process a claim for retroactive benefits.

(3) Interest shall be calculated on a simple ten (10) percent per annum basis.

(C) DSS shall adopt regulations with detailed instructions for implementing this Order. The proposed regulations shall be submitted to plaintiff's counsel for review and comment at least twenty (20) days prior to the date DSS plans to adopt the regulations. The regulations shall be adopted on an emergency basis if necessary to promptly implement the terms of this order.

(D) For purposes of calculating retroactive benefits, the following guidelines apply:

(1) The value of need items contributed by the parent of the 18-year old parent during the period from January 18, 1985 through June 25, 1986 shall not be considered as income in-kind.

(2) If the minor parent received cash from the senior parent with instructions to use the cash to make a purchase for the entire family, including the senior parent unit, the cash shall not be considered income to the minor parent and child(ren), regardless of the nature of the expenditures.

(3) When any person (including the senior parent) gave the minor parent cash which was to be used for the minor parent or child(ren) and the cash was given for a restricted purpose, the

cash was not available to otherwise meet current needs and, therefore, shall not be considered income to the minor parent or child(ren).

(4) Cash which was voluntarily and regularly given to the minor parent but was not restricted as to use is considered income to the minor parent to the extent it exceeds the $60 per quarter exempted by EAS Section 44-101.41.

(E) DSS shall develop proposed language for Notices of Action to be sent to claimants to explain any actions taken on a claim. The proposed language shall be submitted to plaintiffs' counsel for review and comment.

(F) Any payments received by a class member pursuant to this Order shall not be considered income in the month received or resources in the month received or the following month for purposes of eligibility for and calculation of benefits under the AFDC program. Recipients shall be informed of this in the Notice of Action which accompanies any benefit check they receive.

IV. STAY PENDING APPEAL

Plaintiffs and DSS agree that payment of retroactive benefits to class members shall be stayed until the decision in this case is final and the appeal resolved. However, the CWDs will process all claims and send Notices of Action to all claimants informing them of the resolution of their claim. Where a claim is denied, claimants will have an immediate right to request a fair hearing. Where a claim is granted in full or in part, claimants will receive provisional Notices of Action and their right to request a fair hearing will not attach until they receive the Notices of Action and payment at the conclusion of

the lawsuit. Class members whose claims are granted in whole or in part will be advised to notify a specific CWD liaison in the event they relocate. Change of address forms will be provided for this purpose.

V. MONITORING

Within 120 days of the close of the claim period, DSS shall provide to plaintiffs' counsel the following statistics broken down by county:

(1) The number of claims paid;

(2) The number of Supplemental Claim Forms sent out;

(3) The number of claims received;

(4) The total amount of money paid to reimburse class members;

(5) The number of claims paid based solely on information in the case file;

(6) The number of claims paid based on information provided by supplemental forms.

VI. FEDERAL FINANCIAL PARTICIPATION

The United States Department of Health Services ("HHS") shall not impose any sanction, fiscal or otherwise, against the State by virtue of the State's compliance with this order, nor shall HHS refuse to provide federal financial participation to the State at the appropriate rates for the administrative and program costs incurred by the State in compliance with this order.

VII. ATTORNEYS FEES

This Court shall retain jurisdiction over the issue of plaintiffs' entitlement to an award of attorneys fees and costs in this case.

DATED: Dec. 22, 1986

/s/ Spencer Williams
JUDGE OF THE FEDERAL
DISTRICT COURT

To be Board
Returned 26

(2)

Supreme Court, U.S.
FILED
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No. 90-1213

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1990

LINDA McMAHON, DIRECTOR, STATE DEPARTMENT OF SOCIAL SERVICES AND STATE DEPARTMENT OF SOCIAL SERVICES,

Petitioners,

vs.

VICTORIA GRIMESY, et al.,

Respondents.

OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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RESTATEMENT OF QUESTION PRESENTED

Should a court of appeal hear a challenge by a defendant/third-party plaintiff to a judgment for the plaintiff in an impleader case where the defendant/third party plaintiff never files a notice of appeal or a notice of cross-appeal, but where the third-party defendant files a timely notice of appeal.

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INTRODUCTION

Defendant California officials ("State") filed timely notices of appeal from two orders in this case. The State, however, chose not to file any notice of appeal or cross-appeal from the judgment entered in December of 1986. As its belated excuse, the State now maintains that in impleader cases a defendant/third-party plaintiff need not file any notice of appeal from a judgment for plaintiff so long as the third-party defendant files a timely appeal.

There is no reason why this Court should take review of this case. The Ninth Circuit's opinion is consistent with settled principles of law. The requirements of Rule 4(a) of the Federal Rules of Appellate Procedure are clear and unambiguous on the filing of a timely notice of appeal. Moreover, a long line of this Court's decisions have reaffirmed that filing a notice of appeal is a

"mandatory and jurisdictional" prerequisite.

The State contends that this case should be reviewed to resolve a conflict between the decision by the court below and the Fifth Circuit in Kicklighter v. Nails by Jannee, Inc., 616 F.2d 734 (5th Cir. 1980). Yet, the unduly lenient approach of Kicklighter towards the requirements of Rule 4 has been totally discredited by later decisions, in particular, this Court's decision in Torres v. Oakland Scavenger Co., 487 U.S. 312 (1988). The State has failed to cite a single, recent appellate opinion that considers Torres but then reaches a different conclusion than the court below.

In any event, this case is not the proper one to raise the issue of whether the requirements of Rule 4(a)(1) and (3) are jurisdictional. A far better case would be one where the defendant/third-

party plaintiff at least had some excuse for not filing a notice of appeal.

Finally, the State argues that the decision of the court below will create a conflict with its obligations under federal law regarding the administration of the Aid to Families with Dependent Children ("AFDC") program. On the contrary, a state always retains the option to provide at its own expense greater welfare benefits than permitted under federal law. Indeed, California has exercised this option in several areas of its AFDC program.

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-20) is reported as Grimesy v. Huff, 876 F.2d 738 (9th Cir. 1989). Because the issue in this case involves the State's absolute failure to file either a notice of appeal or cross-appeal, there are no relevant district court opinions on this issue.

JURISDICTION

For the reasons discussed below, the Court does not have jurisdiction to hear the State's petition for writ of certiorari because the State did not file a notice of appeal or cross-appeal from the order entered by the district court on December 22, 1986, in plaintiffs' favor.

STATUTES INVOLVED

Rule 3(a) of the Federal Rules of Appellate Procedure provides, in relevant part:

> An appeal permitted by law as of right from a district court to a court of appeals shall be taken by filing a notice of appeal with the clerk of the district court within the time allowed by Rule 4. Failure of an appellant to take any step other than the timely filing of a notice of appeal does not affect the validity of the appeal, but is ground only for such action as the court of appeals deems appropriate, which may include dismissal of the appeal.

Rule 4 of the Federal Rules of Appellate Procedure provides, in relevant

part:

(a) Appeals in Civil Cases.

(1) In a civil case in which an appeal is permitted by law as of right from a district court to a court of appeals the notice of appeal required by Rule 3 shall be filed with the clerk of the district court within 30 days after the date of entry of the judgment or order appealed from; but if the United States or an officer or agency thereof is a party, the notice of appeal may be filed by any party within 60 days after such entry. If a notice of appeal is mistakenly filed in the court of appeals, the clerk of the court of appeals shall note thereon the date on which it was received and transmit it to the clerk of the district court and it shall be deemed filed in the district court on the date so noted...

(3) If a timely notice of appeal is filed by a party, any other party may file a notice of appeal within 14 days after the date on which the first notice of appeal was filed, or within the time otherwise prescribed by this Rule 4(a), whichever period last expires...

(5) The district court, upon a showing of excusable neglect or good cause, may extend the time for filing a notice of appeal upon motion filed not later than 30 days after the expiration of the time prescribed by this Rule 4(a). Any such motion which is filed before expiration of the prescribed time

> may be ex parte unless the court otherwise requires. Notice of any such motion which is filed after expiration of the prescribed time shall be given to the other parties in accordance with local rules. No such extension shall exceed 30 days past such prescribed time or 10 days from the date of entry of the order granting the motion, whichever occurs later.

Rule 26(b) of the Federal Rules of Appellate Procedure provides, in relevant part:

> The court for good cause shown may upon motion enlarge the time prescribed by these rules or by its order for doing any act, or may permit an act to be done after the expiration of such time; but the court may not enlarge the time for filing a notice of appeal, a petition for allowance, or a petition for permission to appeal.

STATEMENT OF THE CASE

This case began as a challenge to a state law and its implementing regulation that terminated or reduced the benefits under California's Aid to Families with Dependent Children ("AFDC") program for teenaged parents who were living with their own parents. According to the

challenged rule, sometimes known as the "grandparent deeming" rule, the income of grandparents had to be counted in determining the eligibility for aid of all eighteen-year-old parents living with them. Plaintiffs and respondents Victoria Grimesy, et al., claimed that the grandparent deeming rule violated 42 U.S.C. §§ 602(a)(2) and (a)(39) because it should have been applied only to those eighteen-year-old parents living with their own parents, attending school and expecting to graduate before age 19.

Plaintiffs originally filed suit in state court against defendants and petitioners Linda McMahon, Director of California Department of Social Services, Jesse Huff, Director of California Department of Finance, and their respective state agencies ("State"). Pet.App. 5-6. The State removed the action to the district court. Petition

for Removal, C.R.1.[1] It simultaneously filed a third-party complaint against Otis R. Bowen, Secretary of the United States Department of Health and Human Services ("HHS"), claiming that its grandparent deeming rule had been enacted to comply with federal regulations, 45 C.F.R. § 233.20(a)(3)(xviii). Third-Party Complaint at 2-3, C.R. 4.

On June 25, 1986, the district court granted motions by both plaintiffs and the State for partial summary judgment. Order Granting Summary Judgment at 1-2, C.R. 32. The district court permanently enjoined the State from continuing to implement the grandparent deeming rule and HHS from taking any action against the State for its nonenforcement of this rule. Id. at 2-4. The court also instructed the parties to attempt to

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[1] The abbreviation "C.R." followed by a number corresponds to the docket number assigned to a pleading in the clerk's record in the district court.

reach an agreement on retroactive benefits. Id. at 4.

On July 17, 1986, the State filed a timely notice of appeal from the order granting permanent injunctive relief. Defendant's Notice of Appeal, C.R. 33. As was explained in the Docketing Statement to the Ninth Circuit, the State filed this notice of appeal "to give the federal agency (third-party defendant) a forum" to "defend its regulation." The State added that: "If the federal agency does not file its own Notice of Appeal or otherwise appear, the State will dismiss its appeal." HHS subsequently filed its own notice of appeal. Third Party Defendant's Notice of Appeal, C.R. 37.

On October 22, 1986, Congress enacted the Tax Reform Act of 1986, Pub.L. No. 99-514, which amended 42 U.S.C. § 602(a)(39) to prohibit grandparent deeming for all eighteen-year-old parents. In view of this change

in the law, both HHS and the State subsequently dismissed their appeals from the order granting permanent injunctive relief. HHS' Motion to Dismiss Appeal; State's Motion to Dismiss Appeal.

Meanwhile, plaintiffs and the State were able to agree on an order regarding retroactive benefits. Filed on December 22, 1986, this order (or more appropriately, final decision) contained provisions on how the State should identify class members, send them notices and claim forms, process their claims for reimbursement, and report on the processing of these claims for reimbursement. Pet. App. 25-32. The last section of this order provided that HHS shall not impose any sanctions or deny federal financial participation to the State for its compliance with the other terms of this order. Pet. App. 31.

Pursuant to Fed.R.App.P. 4(a)(1), the State had 60 days to file a notice of

appeal from the December 22 order. The State never filed such a notice. Third-party defendant HHS filed its notice of appeal on the fifty-ninth day, February 19, 1987. Notice of Appeal, C.R. 53. Pursuant to Fed.R.App.P. 4(a)(3), the State then had an additional 14 days to file a notice of cross-appeal. Once again, it never filed such a notice.

On July 17, 1987, the district court awarded attorney's fees to plaintiffs against the State. Order Granting Attorneys' Fees. Notably, the State did file a timely notice of appeal from this fee order. State's Notice of Appeal at 2.

HHS proceeded with its appeal of the December 22 order on retroactive benefits. Throughout the appellate proceedings, HHS consistently argued that the award of retroactive benefits to plaintiffs was final because the State had not filed a timely notice of appeal.

See, e.g., Brief for Appellants to the Ninth Circuit at 34. Plaintiffs nonetheless took an active role in the defense of the district court's judgment, in part because they wanted to vindicate their interpretation of the law, and in part because they wanted the federal government to share in the State's payment of retroactive benefits. Plaintiffs were also concerned that the State would argue, as it does now, that a reversal of the judgment against HHS should apply to it as well.

On May 25, 1989, the Ninth Circuit Court of Appeals entered its original opinion, reversing the judgment for the State against HHS. Pet. App. 4-20. The court of appeals held that the Tax Reform Act of 1986 precluded any claim by AFDC recipients for underpayments of benefits resulting from the earlier implementation of the grandparent deeming rule. Pet. App. 9-20. In response to plaintiffs'

request to amend the opinion, the Ninth Circuit subsequently added one sentence to its opinion, clarifying that the opinion does not change the order pertaining to the State because of its failure to file a notice of appeal. Pet. App. 4, 20.

The State then filed a petition for rehearing. At no point in its petition did the State offer an excuse, much less an explanation, for its failure to file a notice of appeal as to the December order. On November 1, 1990, the court of appeals denied the petition for rehearing. Pet. App. 21-22.

ARGUMENT

I

THE NINTH CIRCUIT'S OPINION IS CONSISTENT WITH SETTLED PRINCIPLES OF LAW THAT THE REQUIREMENTS ON FILING A TIMELY NOTICE OF APPEAL ARE MANDATORY AND JURISDICTIONAL.

This case involves nothing more than one party's failure to comply with the plain rules of appellate procedure. In

its petition for writ of certiorari, the State omits any reference to the critical rule, namely Fed.R.App.P. 4. Rule 4(a)(1) generally requires that a notice of appeal in civil cases "shall be filed with the clerk of the district court within 30 days after the date of the entry of the judgment or order appealed from...." This time limit for filing a notice of appeal may be extended to 60 days in cases, like this one, where the United States or one of its officers or agents is a party. Rule 4(a)(3) further provides that:

> If a timely notice of appeal is filed by a party, any other party may file a notice of appeal within 14 days after the date on which the first notice of appeal was filed, or within the time otherwise prescribed by this Rule 4(a), whichever period last expires.

While the State filed timely appeals from two other orders in this case, it never filed a notice of appeal from the final decision regarding retroactive

benefits. The State did not bother to file a notice of appeal within 60 days after entry of the judgment on December 22, 1986. Nor did the State bother to file a notice of cross-appeal within 14 days after HHS filed its notice of appeal on February 19, 1987. Indeed, the State never sought an extension of the abovementioned time limits for filing a notice of appeal, probably because such a motion in the district court would have required a "showing of excusable neglect or good cause." See Fed.R.App.P.4(a)(5).

Having ignored the clear and unambiguous requirements of Rule 4, the State is, in effect, inviting this Court to do the same. Rule 26(b) of the Federal Rules of Appellate Procedure provides that "the court may not enlarge the time for filing a notice of appeal."

Several years ago, this Court warned: "if no notice of appeal is filed at all, the Court of Appeal lacks

jurisdiction to act. It is well settled that the requirement of a timely notice of appeal is 'mandatory and jurisdictional.'" Griggs v. Provident Consumer Discount Co., 459 U.S. 56, 61 (1982), quoting from Browder v. Director, Illinois Dept. of Corrections, 434 U.S. 257, 264 (1978).[2] A unanimous Court has also stated:

> It is true that a party who does not appeal from a final decree of the trial court cannot be heard in opposition thereto when the case is brought here by the appeal of the adverse party. In other words, the appellee may not attack the decree with a view either to enlarging his own rights thereunder or of lessening the rights of his adversary, whether what he seeks is to correct an error or to supplement the decree with respect to a matter not dealt with below.

United States v. American Ry. Exp. Co., 265 U.S. 425, 435 (1924) (emphasis added); accord, Massachusetts Mut. Life

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[2] See also Budinich v. Becton Dickinson and Co., 486 U.S. 196, 203 (1986); United States v. Robinson, 361 U.S. 220, 229 (1960).

Ins. Co. v. Ludwig, 426 U.S. 479, 480-81 (1976).

II

THE COURT SHOULD NOT GRANT REVIEW TO RESOLVE A SUPPOSED CONFLICT BETWEEN THE NINTH CIRCUIT'S OPINION BELOW AND THE FIFTH CIRCUIT'S DECISION IN A 1980 CASE, SINCE THAT EARLIER DECISION HAS ALREADY BEEN DISCREDITED BY OTHER, LATER DECISIONS.

Despite these settled principles of law, the State urges review of this case because the Ninth Circuit's opinion is supposedly in conflict with an eleven-year-old decision by the Fifth Circuit, Kicklighter v. Nails by Jannee, Inc., 616 F.2d 734 (5th Cir. 1980). In Kicklighter, the court of appeals concluded that one of the jury instructions was clearly erroneous and so it remanded the case for a new trial on plaintiff's claims of negligence. Id. at 738-42. The Fifth Circuit did reverse the judgment not only against the appealing party, third-party defendant, but also the nonappealing

party, the defendant. Id. at 742-44. However, the Kicklighter court emphasized the "limited scope" and "narrowness" of its holding. Id. at 744 n.16. The Fifth Circuit even warned defendants that they "would be ill-advised to take no appeal, relying on a third-party defendant to successfully assert on appeal" grounds applicable to them. Id.; see also Anthony v. Petroleum Helicopters, Inc., 693 F.2d 495, 497-98 (5th Cir. 1982)(reemphasizing the narrowness of exception in Kicklighter, the Fifth Circuit refused to hear contentions by parties who did not file a protective appeal).

The principal reason for the holding in Kicklighter was the "injustice" of a different legal ruling for the appealing party versus the nonappealing party. 616 F.2d at 744. By the same reasoning, it would be an "injustice" to reverse the judgment for fewer than all the

plaintiffs or all the defendants in any other case so long as one party files a timely notice of appeal and subsequently obtains a reversal on appeal on a legal issue applicable to the other nonappealing parties.

Yet, this Court has repeatedly upheld inconsistent rulings in actions with multiple parties precisely because some of the parties did not file the requisite notices of appeal. For example, in Federated Department Stores, Inc. v. Moitie, 452 U.S. 394 (1981), this Court ruled that the doctrine of res judicata barred the relitigation of anti-trust claims by two plaintiffs who had not appealed the dismissal of their identical claims in an earlier suit. This Court brushed aside the fact that other plaintiffs in the earlier suit had successfully obtained a reversal of the adverse judgment on appeal. Writing for this Court, Justice Rehnquist stated: "It

is the generally accepted rule in civil cases that where less than all of the several co-parties appeal from an adverse judgment, a reversal as to the parties appealing does not necessitate or justify a reversal as to the parties not appealing." Id. at 399 n.4 (citations omitted).

More recently, this Court in Torres v. Oakland Scavenger Co., 487 U.S. 312 (1988), refused to extend the reversal of the judgment against fifteen plaintiffs to the remaining plaintiff in this employment discrimination suit. This last plaintiff's name did not appear on the notice of appeal due to a secretary's clerical error. Id. at 313. The plaintiff nonetheless claimed to have been listed on the notice of appeal by the designation of "et al." Finding that such a vague designation did not comply with the specificity requirements of Fed.R.App.P. 3(c), this Court declared:

> We believe that the mandatory nature of the time limits contained in Rule 4 would be vitiated if courts of appeals were permitted to exercise jurisdiction over parties not named in the notice of appeal. Permitting courts to exercise jurisdiction over unnamed parties after the time for filing a notice of appeal has passed is equivalent to permitting courts to extend the time for filing a notice of appeal. Because the Rules do not grant courts the latter power, we hold that the Rules likewise withhold the former.

Torres, 487 U.S. at 315.

Whatever persuasive force, if any, Kicklighter may have once enjoyed has been eroded by this Court's later decision in Torres. The State insists that Torres does not affect the "continuing vitality" of Kicklighter (Pet. at 9). The circuit court that wrote Kicklighter knows better. In "light of Torres," the Fifth Circuit recently stated that it is "questionable" whether it remains "good law" that an "initial notice of appeal is jurisdictional but a protective or cross-appeal is permissive and courts of appeal

may retain all parties in order to do justice." Stockstill v. Petty Ray Geophysical, 888 F.2d 1495, 1496 (5th Cir. 1989). The court in Stockstill refused to hear the defendant's appeal from the dismissal of its third-party claim even though the defendant was already before the court as an appellee. Id. at 1495-97. According to the Fifth Circuit, the defendant's failure was not filing "a protective notice of appeal." Id. at 1497.

Several circuit courts have held that the filing of a notice of appeal or cross-appeal is a mandatory, jurisdictional requirement in cases with multiple parties. See, e.g., Young Radiator Co. v. Celotex Corp., 881 F.2d 1408, 1415-17 (7th Cir. 1989); Kelley v. Tyk Refractories Co., 860 F.2d 1188, 1199 n. 21 (3rd Cir. 1988); Savage v. Cache Valley Dairy Ass'n, 737 F.2d 887, 888-89 (10th Cir. 1984); Ford Motor Credit Co.

v. Aetna Casualty and Surety Co., 717 F.2d 959, 962 (6th Cir. 1983). Conspicuously absent from the State's petition is a single recent decision where a circuit court, after reviewing the holding in Torres, excused a party's failure to file any notice of appeal or cross-appeal.

The only other case on point cited by the State is an older decision by the Ninth Circuit itself, Bryant v. Technical Research Co., 654 F.2d 1337 (9th Cir. 1981). Like Kicklighter, Bryant was decided several years before Torres and so its continuing precedential value has also been questioned. See Stockstill v. Petty Ray Geophysical, 888 F.2d at 1496-97. In any event, the case at bar is distinguishable from Bryant.

The Ninth Circuit in Bryant pointed to three "unique" factors that justified its reversal of the judgment against the defendant/ third-party plaintiff even

though that party did not file a notice of appeal. 654 F.2d at 1343. First, the trial on the merits of the underlying issues in the case would be partially frustrated if the judgment against the nonappealing defendant was allowed to stand and consequently certain parties were not participants in the trial. Id. at 1342. Second, certain rulings by the district court could have misled the defendant/third-party plaintiff about the need for a cross-appeal. Id. Third, the case was certified as an interlocutory appeal which might have further misled the defendant on the need to appeal. Id. at 1342-43. Even so, the Ninth Circuit stressed the "narrow scope" of its holding, adding: "[i]t will be the unusual case where an appellee that fails to file a notice of appeal can challenge unfavorable aspects of a judgment." Id. at 1343.

The instant case has none of these

three "unique" factors. First, a reversal of the judgment only against the third-party defendant, HHS, will not impair any subsequent jury trial because there never was and never will be a trial in this case. On remand the district court can simply implement the terms of the December 22, 1986 decision requiring the State to pay retroactive benefits to plaintiffs.

Second, no order or ruling by the district court ever misled the State on its need to file a notice of appeal. On the contrary, the district court's decision disposed fully of the plaintiffs' remaining claims against the State and the State's separate claims for reimbursement from HHS.

Third, the appeal in this case was from the final judgment in the case. Thus, unlike Bryant, the State cannot claim that it was somehow misled on the need to file a notice of appeal because

the order was interlocutory.

In its petition (at 5-7), the State points to several instances where plaintiffs referred to themselves as appellees. This assertion is true, but irrelevant. The State cannot claim that it was ever misled by plaintiffs on the need to file a notice of appeal. Nor can the State pretend to have relied upon HHS to be its surrogate in this case. In fact, the State filed a notice of appeal (which was later dismissed) from the earlier permanent injunction in this case "out of a superabundance of caution so as to assure that the federal agency (third-party defendant) could argue the validity of its regulation on appeal, if it chose to do so." State's Motion to Dismiss Appeal at 2. Why did the State not file a similar protective notice of appeal as to the district court's later decision on retroactive benefits? No explanation has ever been supplied.

Even if the question still may exist after Torres as to whether the requirements of Fed.R.App. 4(a)(1) and (3) are jurisdictional in impleader cases, this case is not the one to resolve this question. At the outset, this Court will not benefit from a thorough discussion of the issue by the court below. The Ninth Circuit's opinion contains just one terse sentence that refuses to reverse the judgment against the State in plaintiffs' favor. Pet.App. 20.

Furthermore, the State is hardly the one to complain about the consequences of the requirements of Rule 4 being considered jurisdictional. Recognizing the need to file protective notices of appeal in this case, the State filed such a notice as to the earlier permanent injunction. The State simply elected not to appeal the final decision against it on retroactive benefits. Thus, a much

better party to raise the question of appellate jurisdiction would be one who at least could point to some countervailing considerations for not filing a notice of appeal.

III

THE DISTRICT COURT'S FINAL JUDGMENT DOES NOT CONFLICT WITH FEDERAL LAW ON THE ADMINISTRATION OF AFDC PROGRAMS.

There is no truth to the State's remaining argument that compliance with the district court's final judgment is "contrary to federal law" for AFDC programs (Pet. at 14). In the AFDC program, the federal government provides funding to states to share in the cost of assistance for those needy families who meet federal eligibility criteria. 42 U.S.C. § 602. A state is always free to provide AFDC assistance to people from its own funds where federal matching funds are unavailable. See, e.g., Engelman v. Amos, 404 U.S. 23, 24 (1971);

Reyna v. McMahon, 180 Cal.App.3d 220, 225 Cal.Rptr. 405 (1986).[3] California does so in several instances. Compare Calif. Welf. and Inst. Code § 11450(b) with 42 U.S.C. § 606(b) (California provides AFDC benefits to first-time pregnant women from date of verification, although federal participation is only available from the six month of pregnancy); compare Calif. Welf. and Inst. Code § 11315 with 42 U.S.C. § 607 (California provides AFDC benefits to certain families with unemployed children when no federal participation is available). Federal AFDC law does not prohibit the State from paying retroactive benefits to the plaintiffs.

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[3] See also Brief for Appellants to the Ninth Circuit at 9, where HHS similarly asserts: "A state may provide welfare benefits that do not meet the federal eligibility requirements so long as the funding for such benefits is borne solely by the state."

CONCLUSION

The State wants this Court to loosen the requirements on the filing of an appeal. "In the long run, experience teaches that strict adherence to the procedural requirements specified by the legislature is the best guarantee of evenhanded administration of the law." Hallstrom v. Tillamook Cty., ___U.S.___, 110 S.Ct. 304, 311, 107 L. Ed. 2d 237 (1989), quoting from Mohasco Corp. v. Silver, 447 U.S. 807, 826 (1980). The same observation holds true for the procedural requirements specified by this Court. The State's petition for writ of certiorari should be denied.

Respectfully submitted,

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